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In the Supreme Court of the United States

OCTOBER TERM 1976

No. 76-200

TEXAS EDUCATION AGENCY
(AUSTIN INDEPENDENT SCHOOL DISTRICT), *et al*,
Petitioner

v.

UNITED STATES OF AMERICA, *et al*,
Respondents

MEXICAN AMERICAN LEGAL DEFENSE &
EDUCATIONAL FUND, *et al*,
Intervenors-Respondents

DEDRA ESTELL OVERTON, NATIONAL
ASSOCIATION FOR THE ADVANCEMENT OF
COLORED PEOPLE, *et al*,
Intervenors-Respondents

Mexican American Intervenors' Brief in Opposition to Petition for Writ of Certiorari

to the United States Court of Appeals for the Fifth Circuit

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MEXICAN AMERICAN INTERVENORS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Respondent, Mexican American Intervenors respectfully request this court to deny the petition for a writ of certiorari filed herein by the Austin Independent School District.

OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit has issued two substantive opinions in this litigation. The first opinion is reported at 467 F_2 848 (1972) (en banc). The second opinion, which incorporates the factual findings of the first opinion, is reported at 532 F_2 380 (1976). The District Court opinions, which are unreported, may be found at pp. 44, 58 and 74 of the Appendix to the Petitioner's Petition for Certiorari.

QUESTIONS PRESENTED

1. Whether, on facts similar to those found to constitute de jure segregation in Denver (Keyes v. School District No. 1, 413 U.S. 189 (1973)), but indeed more extensive, the Fifth Circuit properly found the Austin Independent School District guilty of de jure segregation of Mexican American students.

2. Whether the Fifth Circuit properly overruled a District Court ruling to exclude Kindergarten through Grade Five children from any desegregation when there had been (a) a

finding of de jure segregation of such children, and (b) the only testimony in support of such exclusion was a naked assertion by the superintendant that he considered busing at such an age to be educationally unproductive.

STATEMENT OF THE CASE

On August 7, 1970, the United States filed suit pursuant to 42 U.S.C. 2000c-6(a) and (b) and the Fourteenth Amendment against the School District alleging that it was discriminating against Mexican American students by its student assignment policies which resulted in the segregation of such children from Anglos. The United States further alleged that the School District had not dismantled its statutorily imposed dual system as to Blacks despite this Court's decision rendered sixteen (16) years prior thereto in Brown I. On June 28, 1971 the District Court ruled that there had been no de jure segregation of Mexican Americans, but that some vestiges of the statutorily imposed segregation of Black children remained. (Petitioner's Appendix 74).

On July 19, 1971 the District Court

entered an order implementing a plan which purported to desegregate Black children by: (a) closing both of the Black secondary schools and busing those children across town to predominately Anglo schools, and (b) leaving all elementary students in their segregated neighborhood schools but establishing various contacts between students for such activities as field trips. It was estimated by the School District that these contacts would result in integrated learning experiences for twenty-five (25%) percent of the students' time in school. (Petitioner's Appendix, 58).

On August 2, 1972 the United States Court of Appeals for the Fifth Circuit reversed the District Court's finding that there had been no de jure segregation of Mexican Americans. The Court further ruled that the plan adopted for Blacks was improper. 467 F_2 848 (1972) (En Banc). The School District's representation of this decision as a decision by six of fourteen judges is incorrect. All fourteen judges concurred that the District Court should be reversed for its failure to find de jure segregation of Mexican Americans and for its

approach to desegregating Black children.[1/] It was only with respect to remedial directions to the District Court that the fourteen judges divided.

Upon remand, the District Court required a further trial of the issue of liability for the segregation of Mexican American children. This was due nominally to the intervening decision in Keyes v. School District No. 1, 413 U.S. 189 (1973). The Court again ruled that there had been no de jure segregation of Mexican Americans. Further, the District Court again ordered that (a) the Black secondary schools be closed, and (b) that a school district plan exempting Kindergarten through Grade Five from desegregation was acceptable. The only concession by the District Court to the mandate of the Court of Appeals was to integrate Blacks at Grade Six. Mexican American children were again left in their segregated facilities.

This decision was appealed by the United States and by the Mexican American

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[1/] See especially the first paragraph of the concurring opinion. 467 F_2 848, 883.

and Black intervenors. On May 13, 1976, a three judge panel of the Fifth Circuit again reversed the District court. Weighing the facts previously considered en banc and supplemented by the facts developed on remand against the intervening decision in Keyes, supra, the Court again ruled that the School District was guilty of intentional segregation of Mexican American children. The court further held that the plan leaving Kindergarten through Grade Five segregated was improper. A request for a rehearing en banc was denied and this petition ensued.

ARGUMENT

A. This Is A Classical Northern-style Desegregation Case That Is Not In Any Way Dependant Upon A Holding That The Neighborhood School Is Unconstitutional

The Petitioners would incorrectly have this Court believe that the Fifth Circuit ruled the neighborhood school unconstitutional. Nothing could be further from the truth. This case initially proceeded upon the assumption that affirmative acts and omissions causing and intending to cause the segregation of Mexican American children

were a predicate to a finding of unconstitutional de jure segregation. The evidence, twice presented and twice evaluated by the Court of Appeals, substantiates that there were significant and pervasive intentional acts of segregation against Mexican American children. This evidence is similar to that which has been held throughout the circuits to constitute de jure segregation, and is similar to the evidence presented in Denver and considered by this Court in Keyes, supra. It is only because there is a District Court in the instant case which has done all in its power to avoid ordering desegregation that this case was not resolved long ago, and the School District finally and peacefully integrated.

As previously noted, it is necessary to read the most recent decision of the Court of Appeals (532 F_2 380 - Austin II) in conjunction with its first decision (467 F_2 848- Austin I) in order to fully understand the factual basis for the court's determination that Mexican American children have been intentionally segregated. The Court in Austin II obviously saw little point in repeating its discussion of the facts. We now discuss

briefly some of those facts found by the Court in Austin I.

Historically, a primary vehicle for maintaining a separation of Anglos and Mexican Americans in the Austin Independent School District was the "dual overlapping zone". By this device, two schools, one Anglo and one Mexican American, would share a common boundary. Anglos would then go to the Anglo school and Mexican Americans to "their" school. The only dual overlapping zones found in the A.I.S.D. were between Anglo and Mexican American schools. Clearly this unique deviation from the neighborhood school plan raises a clear inference of segregatory intent. See discussion in Austin I 467 F_2 at 866-67.[2/]

[2/] The "dual overlapping zone" is essentially identical to the "optional zone" frequently found by lower courts to be a segregative device. See, eg. Morgan v. Kerrigan, 509 F_2 580, 589 (2nd Cir. 1974) cert. den. 95 S.Ct. 1950 (Boston), Brinkman v. Gilligan, 503 F_2 684, 695-96 (6th Cir. 1974) (Dayton), U.S. v. Board of School Comm. of Indianapolis, 474 F_2 81, 86 (7th Cir. 1973) cert. den. 93 S.Ct. 3066 (1973); United States v. School District of Omaha, 521 F_2 530, 540-43 (8th Cir. 1975) cert. den. 96 S.Ct. 361 (1975).

The Court in Austin I further discussed at some length the gerrymandering of school boundaries and school site selection which contributed to the segregation of Mexican American children. The Court singled out for discussion the situation surrounding the building of O'Henry Junior High School in 1953. The evidence showed that it was built as a predominately Anglo school and that in order to provide "relief" for Anglo students living in the Allan Junior High School neighborhood, the boundaries were adjusted so that many of these students could attend O'Henry. The predictable result was to further isolate Mexican American students. 467 F_2 at 867. The court noted a similar occurrence surrounding the dispersal of students at the University Junior High School site after it was reclaimed by the University of Texas. Appendix "C" to the Austin I decision provides a further picture of intentional segregation through site selection. This chart describes the ethnic make-up of all schools which opened after 1954. Twenty-four (24) of thirty (30) schools opened with an enrollment in excess of 90% Anglo or minority. (467 F_2 at 882). This unbroken pattern, as

observed by the Austin I Court, raises a strong inference of intentional segregation of minority children.[3] Nothing in the record successfully rebuts this inference.

Adding further to the above-stated evidence of intentional segregation, the Court observed that its review of school boundary lines corresponded with ethnically and racially segregated neighborhoods. 467 F_2 at 863, n. 22. This further buttresses the inference of intentional gerrymandering.

Various courts have found faculty segregation especially probative on the issue of intent since it is so fully within the power of the school district to control.[4]

3/ This Court has several times noted the segregative power that school boards have through the use of site selection. Swann v. Charlotte-Mecklenberg Board of Education, 402 U.S. 1, 21 (1971), Keyes v. School District No. 1, 413 U.S. 189, 201-202 (1973).

4/ This court observed in Swann v. Charlotte-Mecklenberg Board of Education, 402 U.S. 1, 18 that "Independent of student assignment where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff --- a prima facie case of violation of substantive constitutional

Appendix "A" to the Austin I decision shows that Mexican American faculty members were generally assigned to predominately minority schools. While Mexican Americans constituted only three (3%) percent of the total professional staff of the School District,[5] fifteen (15%) percent of the teachers at predominately minority Johnston High School were Mexican American. Indeed, fifteen (15), of the twenty-three (23) Mexican American High School teachers taught at Johnston, although Johnston only constituted one (1) of eight (8) high schools. At the elementary school level, Mexican American teachers are found at only fourteen (14) of the District's fif-

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4/ (Continued)

rights under the Equal Protection Clause in shown". See also, United States v. Board of Comm. of Indianapolis, 474 F 81, 87 (7th Cir. 1973), cert den., 93 S.Ct. 3066 (1973); Oliver v. Michigan State Board of Education, 508 F 178, 185 (6th Cir. 1974); cert. den., 421 U.S. 963 (1975) (Kalamazoo); United States v. School District of Omaha, 421 F 530, 537-38 (8th Cir. 1975), cert. den., 96 S.Ct. 361 (1975); Kelley v. Guinn, 456 F 99 (9th Cir. 1972).

5/ At the time, Mexican American students contributed twenty (20%) percent of the District enrollment.

ty-five (55) schools and of those fourteen, only four are predominately Anglo. All of the remaining ten (10) schools at which Mexican American faculty were found had minority enrollments in excess of seventy-five (75%) percent and eight (8) had minority enrollments in excess of ninety (90%) percent.

The above-stated facts are merely some of the facts which the Circuit Court of Appeals took note of in determining the School District guilty of intentional segregation of Mexican American children. The record is replete with additional matters which the Court could have discussed.

As thus can be seen, this is a typical northern-style desegregation case that is in no wise dependent upon a finding that the neighborhood school is unconstitutional. The Petitioner's selective quotation from the opinion in Austin II gives an incorrect cast to the holdings of the Fifth Circuit by failing to discuss the very substantial factual basis for their finding of intentional segregation of Mexican American children in the Austin School District.

B. This Court Has Recently Laid To Rest Any Confusion Which May Have Previously Existed Concerning The Necessity To Prove Intent In A Desegregation Case. There Is Thus No Need For An Additional Ruling On The Same Issue.

The Petitioners have argued that there is a conflict between the Circuits concerning the need to prove intent in a desegregation context. First, the cases which the Petitioners cite do not support this contention. Secondly, to the extent that there may have been confusion on this point, it has been definitively resolved by this Court in Washington v. Davis —U.S.—, 96 S.Ct. 2040 (1976) and Pasadena City Board of Education v. Spangler, 44 U.S.L.W. 5117 (June 28, 1976). There is no need for a further decision to belabor the point that intent is an element of a desegregation claim based upon 42 U.S.C. 1983 or the Fourteenth Amendment.

This holding in these two cases is, of course, in keeping with the holding by the Circuit Court in the instant case. The Court rejected the intervenor's contention that Keyes, supra, did not require a finding of intent, citing from its previous decision

in Morales v. Shannon, 516 F_2 411, 412-413 (5th Cir.,1975), cert. den. —U.S.—, 96 S.Ct. 566 (1975) that,

> [W]ith respect to the first issue, segregatory intent, we are governed by Keyes . . . , which supervened our holding in Cisneros . . . , to the extent that Keyes requires, as a prerequisite to a decree to desegregate a de facto system, . . . proof of segregatory intent as a part of state action. 532 F_2 380, 387.

What the petitioners really seem concerned about is that intent, under this decision, may be proven by circumstantial evidence. They would seemingly require an admission of segregatory purpose by all involved in order to meet this element of proof. As Justice Stevens noted in his concurring opinion in Washington v. Davis, 48 L.Ed.$_2$ 597, 615,

> Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the

> subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequence of his deeds.

As observed by the court in Hart v. Community School Board of Education, New York School District #21, 512 F_2 37, 50, (1st Cir., 1975) most citizens would be "as reluctant to admit that they have racial prejudice as to admit that they have no sense of humor".

The cases cited by the Petitioners as presenting a conflicting view really do not do so. The rule in the Ninth Circuit, as represented, is clearly that intent is an element of a claim for unconstitutional segregation. That too would seem to be the rule in the Second, Sixth and Eighth Circuits, which are cited for the proposition that intent is not an element of a desegregation claim. In each of the cases cited, the Court spent considerable time reviewing the evidence to determine whether segregatory intent could be inferred. In Hart, supra, the Court found that there had been questionable boundary changes and use of feeder

patterns, 512 F_2 37, 46. In United States v. School District of Omaha, 521 F_2 530, 537-546 (8th Cir., 1975), cert. den. 96 S.Ct. 361 (1975), the second case cited by Petitioners, the Court found that faculty assignment had been discriminatory, that student transfers had been utilized to permit segregation of the races, that optional attendance zones had been used as in Austin, and that school site selection had led to significant and unnecessary segregation; on the basis of these facts, the court presumed segregative intent which was not rebuted by the school district. In the other case cited by the Petitioners, Berry v. School District of Benton Harbor, 505 F_2 238 (6th Cir., 1974), the Court found that various facts, such as racially imbalanced faculties, raised an inference of intentional segregation; thus the court remanded for further proceedings.

To the extent that any of the cases cited by the Petitioners reflect an ambiguity on the issue of intent, it must now be recognized that this court's decisions in Washington v. Davis, supra, and Pasadena School Board v. Spangler, supra, remove the basis of any such ambiguity. It is a waste

of this court's resources to reaffirm two decisions decided just last term.

C. The Circuit Court Of Appeals Was Clearly Correct In Reversing An Order Which Kept Black Children Segregated In Grades Kindergarten Through Five.

At the outset, it should be noted that the plan adopted by the District Court, and held to be constitutionally insufficient by the Fifth Circuit, only purported to desegregate Black children; given the finding, twice made by the Court of Appeals that Mexican American children had been the victims of de jure segregation, it was and is clear that the plan adopted by the District Court had to be completely revised.

Secondly, contrary to the inference in the petition, the Court of Appeals did not order into effect a plan developed in New York or elsewhere. The Court remanded this aspect of the case to the District Court with the following directions,

> We suggest that the District Court consider appointing a master to draft a comprehensive tri-ethnic desegregation plan consistant with

> the opinion and the decisions of the United States Supreme Court. The plan should conform to one of the approaches outlined by Dr. Finger in his written submission of August 14, 1972 and in his testimony. 532 F_2 380, 399.

This is a rather flexible direction given the fact that this was the second time that the Court of Appeals had ruled almost identical approaches adopted by the District Court constitutionally insufficient.

The thrust of the Petitioner's argument on this issue is that the School District provided the District Court factual support for finding that the continued segregation of Black children in six grades met the conditions set forth in Swann v. Charlotte-Mecklenberg Board of Education, 402 U.S. 1 (1975). A thorough review of the record belies this contention. Rather than present any significant evidence that geographic or other conditions unique to Austin precluded desegregation of these children, the school district relied on general testimony by Dr. Davidson, the Superintendant, that he did not consider

busing of such children to be educationally advantageous. Indeed, a blanket exclusion of six grades could not be expected to rest on anything more than a general opposition to a busing approach.

While clearly under this court's decisions the practicalities of desegregation must be taken into consideration, and in some situations, one race schools may be permissible, the School District is under a heavy burden to justify such continued segregation. Swann, supra, 402 U.S. 1, 26. Given an uncontroverted history of statutorily imposed segregation of Black children, the blanket exclusion of six grades from desegregation on the naked assertions of disagreement with the educational merit of busing can not meet this burden. The Circuit Court clearly was correct in finding the District Court's adoption of the A.I.S.D. plan improper.

The argument by Petitioners that the inclusion of Grades Kindergarten through Five in a desegregation plan violates congressional policy is contrary to the facts. 20 U.S.C. 1702 (a) (5) cited for this pro-

position, states that "Congress finds that the risks and harms created by excessive transportation are particularly great for children enrolled in the first six grades" (emphasis added). In 20 U.S.C. 1702 (a) (4), Congress defines "excessive transportation" in language similar to this Courts' Swann limitation. "Excessive transportation" is defined as that which "creates serious risks to their [student] health and safety, disrupts the educational process carried out with respect to such students, and impinges significantly on their educational opportunity". (emphasis added). The record in no way supports a conflict with this congressional policy.

CONCLUSION

For the above-stated reasons, Respondent Mexican American Intervenors respectfully request this court to deny the Petition for Certiorari.

Respectfully Submitted,

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